68

No. 814

FILED

MAY 10 1950

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	4
Conclusion	8

CITATIONS

Cases:

Bear Gulch Placer Mining Co. v. *Walsh*, 198 Fed. 351	7
Charleston Railway Co. v. *Hughes*, 105 Ga. 1	7
Chase v. *Jemmett*, 8 Utah 231	7
Consol. Turnpike v. *Norfolk & c. Ry. Co.*, 228 U. S. 596	7
Greve v. *First Div. St. Paul & Pac. R. Co.*, 26 Minn. 66	7
Jacksonville, T. & K. W. Ry. Co. v. *Adams*, 28 Fla. 631	7
Jones v. *N. O. & S. R. R. Co.*, 70 Ala. 227	7
Louisville, N. O. & T. R. R. Co. v. *Dickson*, 63 Miss. 380	7
Lyon v. *The Green Bay & Minnesota Ry Co.*, 42 Wis. 538	7
Morgan's Appeal, 39 Mich. 675	7
New York, O. & W. Ry. Co. v. *Livingston*, 238 N. Y. 300	7
Norfolk & O. V. Ry. Co. v. *Turnpike Co.*, 111 Va. 131	7
Preston v. *Railway*, 70 Tex. 375	7
St. Johnsbury Railroad Co. v. *Willard*, 61 Vt. 134	7
Searl v. *School District, Lake County*, 133 U. S. 553	7
United States v. *Commodities Trading Corporation*, Nos. 156, 163, this Term, decided March 27, 1950	4
United States v. *Cors*, 337 U. S. 325	7
United States v. *Miller*, 317 U. S. 369	7
United States v. *Smith*, 110 Fed. 338	7

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on February 16, 1950, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinions of the Court of Appeals (R. 363-369) are reported at 180 F. 2d 75.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1950 (R. 369). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254.

QUESTION PRESENTED

Whether, when it condemns lands, the United States must pay the owner for an enhancement in value resulting from expenditures made by the Government prior to the institution of condemnation proceedings, and while the lands were under lease to the Government or its agents, to improve such lands.

STATEMENT

By two contracts entered into on January 11, 1941 (R. 236-273) and April 9, 1941 (R. 274-305) between the United States and the Houston Shipbuilding Corporation, the latter undertook to lease from their owners certain lands and construct thereon a shipyard. The United States agreed to bear the entire cost of the project (R. 244-245, 284-285). The contracts specified that the United States would retain title to structures, even though attached to the realty (R. 246-247, 287), and required the Shipbuilding Corporation to procure leases that would safeguard the Government's title (R. 262, 304).

Pursuant to these contracts, the Shipbuilding Corporation obtained leases to the lands condemned in these proceedings. On February 15, 1941, respondent Harris County Houston Ship Channel Navigation District leased to the Shipbuilding Corporation Parcel No. 1, which contained 84.636 acres (R. 309-322). On the same date, respondent Houston Deepwater Land Company leased to it Parcel No. 2, containing 31 acres (R. 192-205) and

COPY BOUND CLOSE IN CENTER

Parcel No. 3, containing 22.03 acres (R. 212-216). These three leases were to end on February 14, 1946 (R. 310, 193, 213) but the lessee could extend them for an additional five years (R. 313, 198). On April 15, 1941, respondent Land Company leased to the Shipbuilding Corporation Parcel No. 4, comprising 73.875 acres (R. 218-224) and on April 15, 1942, Parcel No. 5, a 95.1 tract (R. 226-234). Like the three earlier leases, these were to expire on February 14, 1946, unless extended. In each instance the lessor agreed with the lessee, "but for the benefit of the Government," that the latter had title to all structures (R. 316, 201, 215, 223, 232).

On November 14, 1942, while the lands were being occupied under the leases by the Shipbuilding Corporation, the United States instituted proceedings to condemn them (R. 13-18) and obtained orders giving it immediate possession (R. 19-22). Thereafter, it filed a declaration of taking and deposited its estimate of just compensation (R. 25-40), and obtained a judgment that it had title (R. 45-49).

In view of the explicit provision in the leases that the lessee had title to all improvements, respondents did not claim that they were entitled to recover the value of such improvements. But they did contend they should be awarded the present value of the lands as enhanced by dredging, filling and leveling done at the Government's expense. The United States took the position, how-

ever, that it could not be compelled to pay for such enhancement in value since it resulted from the Government's own expenditures.

Before deciding the issue, the trial judge asked the jury to find as to each parcel its value (1) on the date it was leased, (2) on the date of taking but excluding all improvements made by the Government, and (3) and on the latter date including only the improvements resulting from the dredging, leveling and filling done by the United States. As to each parcel, the jury found that, excluding improvements made by the Government, the value had not changed between the date it was leased and the date it was condemned, but that between these dates, because of the improvements by dredging, filling and leveling done by the United States, each parcel had increased in value, and that all five parcels, otherwise worth $387,800.60, had increased in value to $720,097.15 (R. 132-139).

Upholding respondents' contentions, the trial court entered judgments for the larger amounts (R. 131-159, 160-169). The Court of Appeals for the Fifth Circuit, with Judge McCord dissenting, affirmed (R. 369).

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Commodities Trading Corporation*, Nos. 156, 163, decided March 27, 1950, this Court held that, in all cases raising questions as to the measure of "just compensation", the "dominant consideration always remains the same: What

COPY BOUND CLOSE IN CENTER

compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" The Court went on to say that "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' * * *." (Slip opinion, p. 2.) In this case, the United States, as lessee, expended several hundred thousand dollars to dredge, fill, and level the lands which it subsequently condemned. The leases neither imposed upon the Government an obligation to make such expenditures nor provided that, if such expenditures were made, the lessors were entitled to benefit thereby. The court below, nevertheless, has held that the United States must pay the lessors the enhanced value to the lands resulting from its own expenditures. The result is that the Government has been compelled to pay twice for having these lands improved.

This is not a case in which there was an understanding, express or implied, between the Government and the lessors that the improvements would be made as a *quid pro quo* for a reduced rental. Contrary to the statement made in the majority opinion of the Court of Appeals (R. 366), there is no evidence whatsoever in the record to support the conclusion that it was "within the intent, purpose, and contemplation of the parties to the leases" that the Government would improve these properties by dredging, filling, and leveling. And there is no provision in the leases which warrants the

statement of the majority below that "the right to receive the lands back with the improvements *to* the lands as distinguished from improvements *on* the lands was a right implied in the leases that inheres in the land-owners." (Ibid.)

To be sure, if the Government had not condemned these lands, in all probability they would have been returned to the owners, at the expiration of the leases, in their improved condition. As the court below said, it is "fantastic and unthinkable" that the United States "would spend large sums of the taxpayers' money to disimprove, or unfill, or unlevel the lands upon the termination of the lease" (R. 366). But merely because the United States probably would not take steps to restore the lands to their original and less valuable condition should not obscure the fact that the improvements would constitute a windfall to the lessors—improvements which the United States was under no obligation to make. The decisive consideration is that these lands were enhanced in value as a result of expenditures which the Government was not obliged by the leases to make, and that these improvements were made solely for the benefit of the Government, *i.e.*, to promote the object for which the lands were leased, the construction of ships. Clearly, if any governmental purpose would have been served by a subsequent alteration or destruction of these improvements, the Government could have proceeded without violating any provision of the leases, and

CARRY BOUND CLOSE IN CENTER

without regard to the effect on the value of the lands or the wishes of the lessors.

In holding that the Constitution requires such a windfall to the lessors, and in subjecting the United States to a double liability for the cost of the improvements, the court below has applied a rule of just compensation which appears neither fair nor equitable, and which is in conflict with the rulings of this Court that the Constitution does not require a condemnor to pay for an increase in value which it has voluntarily created. *Searl* v. *School District, Lake County*, 133 U. S. 553; *Consol. Turnpike* v. *Norfolk &c Ry. Co.*, 228 U. S. 596, 602; *United States* v. *Miller*, 317 U. S. 369, 377; *United States* v. *Cors*, 337 U. S. 325, 331-334.[1]

2. It is important that the question here presented be authoritatively decided, both as a precedent to be followed by the lower courts in deciding similar cases and as a guide to Government officials in the leasing and administration of federal prop-

[1] Typical of a host of decisions of other courts to the same effect are the following: *Lyon* v. *The Green Bay & Minnesota R'y Co.*, 42 Wis. 538, 544-545; *Morgan's Appeal*, 39 Mich. 675, 679-680; *Greve* v. *First Div. St. Paul & Pac. R. Co.*, 26 Minn. 66, 70; *Jones* v. *N. O. & S. R. R. Co.*, 70 Ala. 227, 233-234; *Louisville, N. O. & T. R. R. Co.* v. *Dickson*, 63 Miss. 380, 385; *Preston* v. *Railway*, 70 Tex. 375; *St. Johnsbury Railroad Co.* v. *Willard*, 61 Vt. 134, 137; *Jacksonville, T. & K. W. Ry. Co.* v. *Adams*, 28 Fla. 631, 638; *Chase* v. *Jemmett*, 8 Utah 231; *Charleston Railway Co.* v. *Hughes*, 105 Ga. 1, 15-18; *United States* v. *Smith*, 110 Fed. 338, 340 (E.D. N.Y.); *Norfolk & O. V. Ry. Co.* v. *Turnpike Co.*, 111 Va. 131, 140, *et seq.*; *Bear Gulch Placer Mining Co.* v. *Walsh*, 198 Fed. 351, 355 (D. Mont.); *New York, O. & W. Ry. Co.* v. *Livingston*, 238 N.Y. 300, 304, *et seq.* So far as is known, there is no authority to the contrary.

erties. The extent to which the United States is required by the Fifth Amendment to compensate a private owner for enhancement of value resulting from improvements voluntarily made by the Government as lessee, where the lease neither obligates the Government to make such improvements nor gives the lessor the benefit of any improvements voluntarily made, raises questions which are intrinsically important. In recent years, particularly since the inception of World War II, the Government has with increasing frequency found it necessary to condemn lands which it has improved under leases or similar arrangements. Hence the question here presented will probably recur constantly. Indeed, a similar case is now pending in the court below in which further proceedings have been suspended awaiting the outcome of this case. In these circumstances, the Government respectfully submits that the issue raised warrants authoritative determination by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 884592 977

COPY BOUND CLOSE IN CENTER